Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

Steven Smith,

Petitioner

v.

Consolidated Freightways, Inc.,

Respondents

On Petition for *Writ of Certiorari*
To the Supreme Court of Pennsylvania

Petition for *Writ of Certiorari*

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QUESTIONS PRESENTED

I. Whether the Pennsylvania courts lacked subject matter jurisdiction over Petitioner's claim when Respondent Employer filed an untimely Notice of Denial, in violation of federal and state regulations?

II. Whether the Pennsylvania state courts violated Petitioner's due process rights when the courts:

a) Failed to admit or consider relevant evidence;

b) Failed to act on Employer's withholding of reports essential to Petitioner's claim;

c) Failed to act on Petitioner's undisputed allegations that Respondent committed perjury by submitting false evidence;

d) Failed to entertain an appeal of Petitioner's claim.

III. Whether Pennsylvania state courts erred in failing to enforce an agreement between Respondent and the Department of Labor mandating OSHA compliance?

PARTIES

STEVEN SMITH,

Petitioner/Claimant,

a commercially licensed driver,

v.

CONSOLIDATED FREIGHTWAYS, INC.,

Respondent/Employer,

a self-insured common carrier.

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CITATION TO OPINIONS/ORDERS BELOW

April 19, 2005 Order at 243 WAL 2005
Pennsylvania Supreme Court
Denying Reconsideration of its *Allocatur* Denial.

December 17, 2003 Order at 1828 CD 2003
Commonwealth Court of Pennsylvania
affirmed the Worker's Compensation Appeal Board

July 29, 2003 Order at A02-1087
Worker's Compensation Appeal Board affirmed
Worker's Compensation Judge Henry's
March 26, 2002 Order to Dismiss
2001 Petition alleging Respondent's 1996 perjury;
holding in favor of the non-responsive defenses of
res judicata and *collateral estoppel.*

December 29, 1999 Orders at A97-4661/A98-4922
Worker's Compensation Appeal Board affirmed
Worker's Compensation Judge Vallely's
October 15, 1997 Order to Dismiss Petition
Respondent's May 6, 1996 Notice of Denial
Petitioner's February 28, 1996 Date of Injury.
November 30, 1997 Order to Deny Reimbursement
of Petitioner's medical expenses.

JURISDICTIONAL STATEMENT

Order to be Reviewed

Smith v. WCAB (Consolidated Freightways), 1828 C.D. 2003 (Pa. Cmwlth. December 17, 2003)(unreported opinion), *en banc* review denied (Pa. Cmwlth. February 19, 2004), *Allocatur denied*, 243 WAL 2004 (Pa. Sup. Ct. March 23, 2005), *Reconsideration denied* 243 WAL 2004 (Pa. Sup. Ct. April 19, 2005).

Statutes Conferring Jurisdiction

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

U.S.C.A. Const. Art. III § 2, cl. 2

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.
28 U.S.C.A. § 1257(a)

STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. XIV, §1 ". . . .nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

Hazard Communication Regulations. 29 C.F.R. 1910.1200. (Appendix).

Hazardous Materials Regulations, 49 C.F.R. 171-180. (As Amended 1996). See Appendix.

Pennsylvania Workers' Compensation Act, 77 Pa.Stat. §§ 774.1, 991 (Bisel 2005). (Appendix).

Interstate Transportation Statute, 75 Pa. Cons. Stat. Ann. § 8301 *et seq.* (Appendix).

STATEMENT OF THE CASE

February 28, 1996, Petitioner Steven Smith, a Commercially Licensed Driver, testified that Respondent knowingly unloaded and reloaded a damaged container of Chemrex .1.1.1 Tricloroethane, which contains Dioxane (CAS No. 123-91-1), onto its trailer, over the objection of a dock employee. This statement is confirmed by Respondent's shipping documents. The damaged held a Chemrex division 6.1 (PGIII) hazardous material (HM) that requires warning placards on the truck and MSDS information, which Respondent did not provide for its damaged shipment.

Respondent's employee of thirty years, Petitioner had no symptoms of respiratory injury prior to that accident. Petitioner filed a grievance with the union and an accident report with the employer, listing respiratory complaints.

March 1, 1996, Respondent reported the accident to the Department of Transportation. March 6, 1996, OSHA opened its investigation. Respondent did no hazmat testing or clean-up of the accident.

April 12, 1996, pursuant to settlement with OSHA, reducing fines and penalties, Respondent referred Petitioner to its panel medical providers.

May 6, 1996, Respondent filed its untimely Notice of Denial and contested payment of medicals. Paragraph 6 of the Denial, *other good cause*, stated: "The current information does not establish that your current condition was the result of your work activities on February 28, 2005."

May 12, 1996, Petitioner filed a Claim Petition stating in Paragraph 1: that he was: "*Exposed to an unknown leaking poison which caused shortness of breath, irritated throat, sour taste in mouth, toxic bronchitis, and lingering cough.*" In Paragraph 3

Petitioner stated: *"Company loaded three boxes of Tricholoroethane, of which one box was damaged,..."*

June 30, 1996, the Amended Pennsylvania's Worker's Compensation Act went into effect.

July 3, 1996, Respondent filed an untimely Answer, specifically denying all allegations, which is inconsistent with Respondent's bill of lading; its reports and admissions to the Departments of Transportation, Labor, and OSHA. Respondent's October 26, 1996 report, by a non-examining MD, contradicts Respondent's Answer and denials.

November 13, 1996, Respondent submitted its Second Hearing Exhibits, which selectively exclude Petitioner's April 12, 1996 "medical conclusions" from HAPPI, finding Petitioner unfit to return to work and releasing him to Dr. Frey, who referred Petitioner to Dr. Nellhaus, a pulmonary specialist. Respondent submitted Petitioner's May 28 and June 25, 1996 reports but not the September 1996 report from Dr. Nellhaus, Petitioner's treating pulmonary MD. The WCJ accepted Respondent's expert report as *testimony* despite Petitioner's hearsay objection.

February 25, 1997, Respondent's attorney submitted a letter but refused to appear for a hearing. The Workers' Compensation Judge (WCJ) accepted the letter as Respondent's Exhibit G. The WCJ failed to include Petitioner's correspondence after the hearings as Exhibits.

October 15, 1997 Order, WCJ acknowledged Petitioner's "exposure" to a poisonous chemical but dismissed the Claim Petition based on Respondent's expert report from a non-examining MD and holding that "burden of proof" was born by Petitioner. WCJ considered no Bureau Exhibits filed by the parties.

Errors in the WCJ Findings of Fact:

FF#1 erred on the date of injury and the identification of the specific chemical that caused the injury.

FF#6 that Petitioner: "... *treated at a local emergency room and later consulted several physicians.*" fails to attribute Petitioner's medical treatment to the panel providers or Respondent's OSHA settlement.

FF#10 materially misquoted the September 1996 report of Petitioner's treating pulmonary physician, Dr. Nellhaus, in finding no relationship between the chemical exposure and Petitioner's respiratory injury.

"I can say with a reasonable degree of medical certainty that the exposure of this chemical was temporally related to the onset of this patient's respiratory complaints. The exposure did subject the patient to a period of disability; I would not expect this disability to be permanent, however."

Dr. Nelhaus

FF#12 materially misquoted Respondent's expert, who relied upon "*absence of literature*" as opposed to finding Respondent's expert *"reviewed literature."* Further, the WCJ materially misquoted Respondent's expert by deleting the word "known" (i.e.) a hiatal hernia as purported source of Petitioner's symptoms.

FF#13 quoted and relied on a 12/18/96 medical report never admitted into evidence and not listed as an exhibit. Additionally, medical reports were given the same evidentiary weight as cross-examined expert testimony. Petitioner's Counsel registered a record hearsay objection to admission of the expert report, which Respondent never cured. The WCJ failed to incorporate Petitioner's hearsay objection when it relied upon the report in its October 15, 1997 Order.

Therefore, FF#14, 15, 16 were made contrary to or absent substantial evidence that the court relied on to support conclusions of law drawn to deny the claim.

November 30, 1996, WCJ Vallely denied Claimant's petition for reimbursement of medical expenses, including the HAPPI panel provider bills derived under the direction and control of Respondent. Petitioner relied upon the Veteran's Administration to help him pay medical expenses that Respondent refused to pay.

Errors in the WCJ Findings of Fact:

FF#2 that Respondent's Answer was timely and responsive is both a facial and material legal error in denying payment of benefits.

FF#3 that: Petitioner *".. had received no medical treatment between February 28, 1996, the date of exposure, and August 12, 1996 for any symptoms he believed were associated with the work-related chemical exposure."* is both a material error and facially contradictory to the October 15, 1997 Decision and the Exhibits relied upon.

FF#3 materially misquoted Respondent's expert by deleting the word *"known"* hiatal hernia, as causing Petitioner's complaints.

FF#4 & 5 fail to explicitly set forth why the court ruled out Petitioner's medical evidence. Therefore, the WCJ's findings of fact do not support the WCJ's conclusion of law or decision denying Petitioner's petition for payment of medical benefits.